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In the Supreme Court of the United States

October Term, 1979

No. 79-1064

PATRICK J. HANKINSON,
Petitioner

vs.

DAVID K. RUHLMAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Patrick J. Hankinson, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on September 12, 1979.

OPINIONS BELOW

The Court of Appeals for the Third Circuit issued no opinion, 605 F.2d 1197 (3rd Cir. 1979). The judgment of the United States District Court for the Western District of Pennsylvania is printed in the appendix attached hereto. The appendix also contains the memorandum orders of the District Court denying petitioner's motions for dismissal, summary judgment and new trial, and the judgment orders of the Court of Appeals affirming the judgment of the District Court (September 12, 1979) and denying petition for rehearing en banc (October 9, 1979).

JURISDICTION

The judgment of the court of appeals was entered September 12, 1979. A petition for a rehearing en banc was denied October 9, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred (1) in denying petitioner's motion for a directed verdict at the close of plaintiff's case; (2) in submitting the case to the jury under an erroneous charge as to the fundamentals of plaintiff's case; and (3) in denying petitioner's motion for a new trial?

2. Whether a state police officer, acting on a personal belief that his superior officers' directive is improper, enjoys a First Amendment right to advise subordinate officers to disobey that directive, and whether he may recover damages under 42 U.S.C. §1983 if he is transferred for doing so?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in the case are that portion of the First Amendment to the Constitution of the United States which provides as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ,

and that portion of the Fourteenth Amendment which provides as follows:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law.

The statutory provisions involved are:

(1) 42 U.S.C. §1983 providing as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(2) 28 U.S.C. §1343 providing in part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *

> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

SUMMARY OF THE CASE AND OF THE REASONS FOR GRANTING WRIT

Viewed through the wrong end of the telescope, this is a §1983 action by a state police sergeant against his commanding officer, a captain, based on the captain's interference with the sergeant's First Amendment rights. The sergeant claimed that the captain instituted a quota system whereby the station's troopers were required to meet a given quota of arrests monthly. When the captain transferred the sergeant to another station, the sergeant claimed that this was retaliatory for his taking the quota issue to the public press and also for his urging troopers at the station not to comply with the quota system. The case went to the jury which found for the sergeant in the amount of $50,000.00.

The court charged the jury that it could consider the issue of the sergeant's going to the press even though the sergeant admitted on the witness stand that this was not the basis of his case, and even though all the evidence revealed that the sergeant's transfer antedated his resort to the press by a considerable time. This alone constitutes reversible error. But the trial court also misinterpreted this Court's opinion in *Pickering v. Board of Education,* charging the jury in effect that so long as the matter involved was of public concern and the plaintiff spoke in a proper manner without maligning or defaming his superiors, the plaintiff had a First Amendment right to counsel the troopers at the station not to obey orders which he believed to be wrong.

The United States Court of Appeals for the Third Circuit affirmed the district court's decision without opinion.

The courts below erred on two grounds:

1. As a matter of common law, the trial court erred (1) in refusing to give judgment for defendants at the close of plaintiff's case, (2) in submitting the case to the jury on an erroneous charge, and (3) in refusing defendant Hankinson's motion for a new trial.

2. As a matter of constitutional law, a policeman is not free to counsel disobedience to orders without at the very least first submitting the dispute to his superiors for clarification or modification.

STATEMENT OF THE CASE

This is a civil rights action brought under 42 U.S.C. §1983 and §1985 and 28 U.S.C. 1343(3) (4). (The §1985 count was dismissed by the court during trial and has no significance.) The plaintiff, David K. Ruhlman, was employed by the Pennsylvania State Police as a sergeant and was stationed at Franklin, Pennsylvania. His immediate superior was defendant Lieutenant Robert B. Gorman; Gorman was also stationed at Franklin, where he had charge of the station. Gorman in turn reported to defendant Captain Patrick J. Hankinson, who as the troop commander had his headquarters at Erie, sixty-two (62) miles distant. Hankinson, believing that the troopers at Franklin were loafing, pressured Gorman and another sergeant at Franklin named Lorent (not a party to the case) to put the troopers to work. The troopers resented the pressure. Word got about that Lorent, acting on Hankinson's direction, was exhorting them to meet a fixed quota of contacts or arrests. The testimony as to the alleged quota system of arrests was conflicting. Some of plaintiff's witnesses—troopers working out of the Franklin Station—testified that a quota system of arrests was in force, while this was denied by defendants' witnesses, particularly by Sergeant Lorent, who was in charge of the traffic detail and the man directly responsible for the alleged quota.

In the fall of 1974 defendant Hankinson was dissatisfied with the performance of the Franklin Station

and decided to make changes. On January 8, 1975 he submitted to his superiors a request for various reassignments, one of which involved plaintiff Ruhlman's transfer to Erie, sixty-two (62) miles away. This request was approved January 20, 1975 and Hankinson's formal personel order transferring Ruhlman was dated February 19, 1975.

Ruhlman during this period was also dissatisfied. He testified that the troopers' morale was poor, that the men resented the alleged quota system, and that he counseled them not to follow the quota system. Resenting his transfer and the serious personal inconvenience it caused him and his family, he decided to take the quota case to the newspapers. *He made no effort to discuss the quota system with defendant Hankinson even though Hankinson personally discussed his transfer with him at the Franklin Station on February 19, 1975.* In early March, 1975 newspaper articles appeared in local newspapers discussing the existence of an alleged quota system at the Franklin Station. These articles were based on information obtained from Ruhlman. Hankinson testified that he knew nothing about Ruhlman's authorship of these article and was surprised to learn of Ruhlman's involvement. No other testimony attributed such knowledge to Hankinson.

On June 10, 1976 plaintiff filed his complaint in the United States District Court for the Western District of Pennsylvania (and subsequently filed an amended complaint) naming as defendants, in addition to Hankinson, James D. Barger, Commissioner of the Pennsylvania State Police, and Robert B. Gorman, the lieutenant in

charge of the station at Franklin. Barger was subsequently dismissed as a defendant by court order and the jury found in favor of Gorman, so that for all practical purposes these defendants cease to play any significant role in the case and it devolves into a contest between Ruhlman and Hankinson.

Rulings by the District Court

Defendants initially moved to dismiss the amended complaint. In denying the motion, the District Court advanced two reasons: (1) plaintiff had a First Amendment right to bring to public attention the alleged quota system, this right being based on *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968), and *Roseman v. Indiana University,* 382 F. Supp. 1328 (W.D. Pa. 1974), aff'd 520 F.2d 1364 (C.A. 3, 1975), cert. denied, 424 U.S. 921 (1976); and (2) plaintiff had a property right, created by State Police regulations, not to be punitively transferred.

Defendants filed an answer, proceeded with discovery, and then filed a motion for summary judgment. Although the materials presented in connection with the motion seemed to point conclusively to the fact that Hankinson's decision to transfer Ruhlman antedated the newspaper articles by a considerable time, the court nevertheless ruled that "It cannot be determined without a trial on the merits whether the captain [Hankinson] was aware of the fact that the reporters were working up a story about the quota system and other matters at the Franklin

Barracks at this time and that this actually was punishment for discussing matters with the press."

The case went to trial and was submitted to the jury, which brought in this special verdict:

> 1. Was the plaintiff's transfer from Franklin to Erie in March, 1975 caused by his exercise of his right to free speech?
>
> Answer: Yes
>
> 2. Was the matter on which plaintiff spoke a matter of legitimate public concern?
>
> Answer: Yes
>
> 3. Was plaintiff's transfer for the purpose of punishment in violation of the regulation, Plaintiff's Exhibit 1, Page 15, effective February 4, 1975, without notice of charges or hearing?
>
> Answer: Yes
>
> 4. Did the defendants act in good faith and with a reasonable belief that their actions were proper under the law?
>
> Defendant Hankinson—Answer: No
>
> Defendant Gorman —Answer: Yes
>
> 5. If your answer to 1 and 2 are [sic] yes or your answer to 3 is yes, what amount of damages do you award plaintiff?
>
> $50,000 Hankinson Yes
>
> Gorman No

6. Did the defendants act maliciously with malicious intention to deprive the plaintiff of his rights or do him injury?

Hankinson Yes

Gorman No

7. If so, what amount of damages for this item is included in your award for damages, if any?

$1 (Transcript, page 584)

Defendant Hankinson moved for a new trial and the court overruled the motion on the following ground:

> Although plaintiff's case was thin, and the evidence did not compel the verdict reached, the jury was justified in finding that plaintiff was transferred for the exercise of protected rights rather than for insubordination. In a close case such as this, a court has no authority to overturn the jury's verdict unless its decision was clearly erroneous. (Appendix, page 28a.)

The entire thrust of the opinion is that the jury could find Hankinson liable in damages for transferring Ruhlman because of Ruhlman's legitimate exercise of free speech, *not in going to the newspaper but counseling the troopers not to cooperate with the quota system.* The court did not rule on the Fourteenth Amendment issue at all—"Having determined the First Amendment issue in favor of the plaintiff, the court finds it unnecessary to address the Fourteenth Amendment due process property right question." (Appendix, page 29a.)

Judgment was thereupon entered in favor of Ruhlman against Hankinson in the amount of $50,000.00. The

District Court denied defendant Hankinson's motions for new trial or amendment of the judgment and Hankinson appealed to the Court of Appeals for the Third Circuit. That court affirmed without opinion, 605 F.2d 1197 (C.A. 3, 1979). Hankinson's petition for rehearing before the full court was denied by order, without opinion, dated October 9, 1979.

REASONS FOR GRANTING WRIT

I. The Judgment Should Be Reversed Because the Charge to the Jury Contained Reversible Error and the Evidence Does Not Support the Verdict

A careful study of the record in this case reveals a pronounced bias on the part of an otherwise temporate and able judge—a bias so extreme as to tilt the court's ruling decisively in favor of plaintiff and to require a new trial if judgment is not entered for defendant on the grounds discussed below.

At the close of plaintiff's case defendants' counsel moved for a directed verdict as to defendants Barger and Gorman. This colloquy ensued:

> Mr. Nene [defendants' counsel]: My second motion then would be to Colonel Barger individually and Lieutenant Gorman individually.
>
> Mr. White [plaintiff's counsel]: Again I will agree that the evidence supports a directed verdict as to Lieutenant Gorman.
>
> The Court: You do?
>
> Mr. White: Well,—
>
> The Court: Well, I agree as to Barger, but I think Gorman is involved.
>
> (Transcrpit, page 286)

The court thereupon denied the motion as to Gorman. Fortunately for him, the jury eventually found in

his favor; but the episode leaves one with a lingering doubt as to the impartiality of a tribunal where the judge, usurping the advocate's role—in a civil trial at that—overrules counsel's own admission that an opposing party should be dismissed.

The court's bias as to the newspaper ruling is even more glaring. It will be recalled that although the evidence adduced through discovery indicated strongly that the newspaper articles, appearing as they did long after Hankinson's decision to transfer Ruhlman was reached, were no longer pertinent to the case, the court nevertheless kept the newspaper issue alive for trial. At trial plaintiff Ruhlman abandoned that contention altogether. He testified on direct examination as follows:

> Q. Sergeant Ruhlman, is not your contention that you were transferred because you divulged the information to the press?
>
> A. No, sir, it is not. My contention is that I was transferred because I was trying and did oppose a quota system set down by Sergeant Lorent with the approval of Captain Hankinson.
>
> (Transcript, page 185)

After the trial was over, in dismissing defendant Hankinson's motion for a new trial, the court noted Ruhlman's shift from reliance on the newspaper theory.

> Initially, the court noticed that at trial plaintiff discarded his contention that his transfer constituted punishment for having revealed the existence of the quota system to the press,[3] [Footnote 3 reads, 'His revelation to the press occurred after his transfer.'],

and proceeded on the alternative First Amendment theory that he was transferred for his discussions with certain troopers concerning his, and their, opposition to the quota system . . . Consequently, plaintiff's abandonment of one free speech theory and advancement of another at time of trial could not have resulted in any surprise or prejudice to defendants since they were put on notice that plaintiff was proceeding on both theories.

(Appendix pages 19a-20a)

Yet during the trial itself the court took totally inconsistent action. The following colloquy ensued at the close of plaintiff's case when defendants' counsel made various motions for judgment:

The Court: Well, I am going to leave Gorman and Hankinson in. But while we are here, gentlemen, there was a matter which concerned me, particularly in view of the argument that Mr. Nene has provided for about causal connection, which I said I was going to leave up to the jury, but on the stand —I have a note here from yesterday—Ruhlman says —this is on cross examination [in fact, it was on direct examination but the point is not important] he says he does not contend that he was transferred because he divulged the quota system to the press but because he had fought the quota system, and I don't know. Of course, there's the plaintiff's own testimony on cross examination, but where does that leave us on the freedom of the press issue?

(Transcript, page 288)

Ultimately, in spite of a subsequent statement by the court that, "It does bother me about plaintiff withdrawing his case on the stand", the court allowed this aspect of the case to go to the jury and charged the jury in part as follows:

Specifically, he claims that on February 19, 1975, the defendants, Patrick J. Hankinson and Robert B. Gorman, punished him for exercising his freedom of speech by transferring him from his duty assignment in Franklin, Pennsylvania, to assignment at Troop E. Headquarters in Erie; also, that they deprived him of his right not to be transferred except for just cause without due process.

Plaintiff claims that approximately the time he was transferred to Erie, he and other troopers at the Franklin Station revealed the existence of a quota system at Franklin to a reporter for the Oil City Derrick, the newspaper.

Plaintiff claims that he informed Farance, the reporter, that the traffic sergeant at Franklin, Sergeant Lorent, had been directing the troopers there to effectuate a quota of 15 and some people said 20 traffic arrests per month under implied threats of transfer or other forms of punishment.

Plaintiff maintains that the defendants punished him for bringing this matter of the so-called quota to the attention of the news media and others and speaking out against it and that this was a matter of legitimate public concern.

(Transcript, page 552-3)

Thus the judge, aware during the trial that Ruhlman had abandoned his resort-to-the-press theory, and admitting later in his post-trial opinion that Ruhlman had in fact shifted his entire position, nevertheless charged the jury that it could find against defendant Ruhlman *on that very issue*. And that the jury considered the issue is apparent from its question for instructions submitted during deliberations:

> Does Question No. 1 pertain to freedom of speech in regard to newspaper article or to all conversations held regarding the quota question?
>
> (Transcript, page 578)

It seems clear from the question itself that the jury was indeed considering Ruhlman's conduct with the troopers, but it is of course impossible to discern what part the newspaper issue played in the verdict. This of itself is reversible error, *Hearst Corporation v. Cuneo Press, Inc.*, 291 F.2d 714 (C.A. 7, 1961).

A further instance of bias can be found in the sidebar colloquy which took place when defendant's counsel attempted to remove the newspaper issue from the case.

> Mr. Nene: I think, your Honor, that in addition to the plaintiff's withdrawing that claim on the stand, there is ample support in his deposition itself for the proposition that any contact he had with the news media was subsequent to his receiving notice of his transfer, and it would be our contention that the First Amendment—
>
> The Court: Oh, I don't think that, no, because I calculated from what Farance said that he started

> to investigate this matter I think about February 14th or thereabouts. The order of transfer wasn't issued until February 19th, effective March 6th, as I recall. In other words, Farance was already in the picture, and so that fact would ordinarily speedily become known to a station commander. I should think that he was prowling around in this area.
>
> (Transcript, pages 290-1)

That is to say, from inference based on conjecture springing from guesswork the jury may find as a fact the essential element in the case, that Hankinson inspired the quota system and knew of Ruhlman's leaking the controversy to the press—this is in the teeth of the plaintiff's own disclaimer on the stand.

The Quota System

In dealing with the quota system attributed to Hankinson through Lorent we must remember that the police unit in question dealt solely with traffic. In this field it is difficult to see how the managers of a police force can track the troopers' performance without some reference to quotas or goals or averages—or whatever nomenclature might be thought appropriate. A traffic policeman has as one of his principal duties the apprehension of those who violate the law. A good traffic policeman will report a number of arrests as well as a number of other citizen contacts not leading to arrest or conviction —warnings not accompanied by citations, aid to motorists in distress, clearing traffic jams or other hazards and the like. A lazy cop will report far less of each. How can

the sheep be separated from the goats without reference to quotas or averages? If throughout the State the average monthly citizen contact is 20, for example, how else can a trooper's performance be statistically measured—extenuating circumstances and conditions being taken into account?

Now a bad quota system—which is uniformly acknowledged to be a sure sign of poor police work—is one which sets *in advance* a given quota of *arrests which must be made, willy-nilly,* by the trooper under threat of sanctions of one kind or another. The vice of such a system is so obvious as to require no elaboration here. On the other hand, a lazy policeman will disclose through the statistics of his performance that his number of arrests and/or other contacts falls far short of the state-wide average. It can scarcely be contended that words criticising such substandard performance, followed by some action by the policeman's superiors, somehow offend the policeman's or the public's rights. A policeman's duty is to make arrests and when it is statistically demonstrated that he fails to do so, some explanation is called for—and also some action by his superiors. Isn't that what we pay policemen to do?

In this case plaintiff's witnesses testified to a quota of 15 or 20 arrests or contacts a month. (The testimony taken as a whole is not altogether clear that only *arrests* rather than public contacts were involved. Nor did any witness testify that anyone was punished or made the victim of sanctions for failing to meet his quota, nor did the jury find that a quota system was in force. But plaintiff has the verdict—let it stand as proved that arrests

were intended.) Fifteen or twenty arrests monthly amount to less than one arrest per day. All law abiding drivers have on countless occasions muttered, as a tractor-trailer thunders by at 75 miles per hour, "Why don't the cops arrest that speeding menace?" As defendant's witness Lorent was noted as saying, "The violators are out there on the highway—go pork 'em." [A fascinating idiom not explained at trial. Does it derive from policeman=pig?]

Is it unlawful per se for a police sergeant to exhort each member of his traffic detail to produce, on the average, less than one arrest per day?

Obviously, as the district judge correctly pointed out, this is a matter of legitimate public concern which could readily be the subject of public discussion. We can name others: wiretapping; the use of force in making an arrest; disparate treatment of minorities, or drunkards, or persons with known criminal records—and so on. In all these instances lines can be drawn between proper and improper police conduct. But in this case the trial judge leaped to the conclusion that an illegal quota system was in fact not only in effect at the Franklin Station but was the decisive issue in the case.

> Mr. Nene: The plaintiff is bringing a parade of troopers in and they are testifying to nothing but the quota system. The quota system is not on trial here. As I understand the issues—
>
> The Court: It isn't? I thought it was.
>
> (Transcript, page 77)

Now whether the quota system was lawful or unlawful is not decisive of the free speech issue at all. Which-

ever it was—and whether it was either, neither or both—was the legitimate object of public and intra-troop inquiry and discussion. The real issue in the case was, so far as the jury was concerned, *did Hankinson unlawfully transfer Ruhlman for exercising his rights of free speech?* To arrive at the answer to this question the judge must first have ruled, as matter of law, that Ruhlman's actions were within his rights and that as matter of law Hankinson could not punitively transfer him by virtue of a police regulation which was put in evidence. (As to the latter ground, it would unduly prolong this argument to refute that holding here. The trial court did not base its opinion on the Fourteenth Amendment issue. That issue had been answered adversely to plaintiff's contention in *Shepp v. Berger* (C.A. 75-1288, M.D. Pa. 1976), and the trial court distinguished that case by stating, "It further appears that the matter being discussed in *Shepp* was not a matter of public concern and free speech as may be involved in the instant case." (Appendix page 16a))

No evidence in the case directly fixed Hankinson with knowledge of the quota system or the troopers' dissatisfaction with it.

Ruhlman admitted that he had never discussed the matter with Hankinson. But nowhere in the court's charge can there be found any instructions or cautionary words as to the necessity of directly linking Hankinson with knowledge of the quota system controversy. Indeed, as to Hankinson's animus, intent or knowledge the charge deals only in the most general terms—the main portion of the charge can be found on only a few pages of the transcript and amounts to an open invitation to the jury to find for plaintiff:

Plaintiff claims that approximately the time he was transferred to Erie, he and other troopers at the Franklin Station revealed the existence of a quota system at Franklin to a reporter for the Oil City Derrick, the newspaper.

Plaintiff claims that he informed Farance, the reporter, that the traffic sergeant at Franklin, Sergeant Lorent, had been directing the troopers there to effectuate a quota of 15 and some people said 20 traffic arrests per month under implied threats of transfer or other forms of punishment.

Plaintiff maintains that the defendants punished him for bringing this matter of the so-called quota to the attention of the news media and others and speaking out against it and that this was a matter of legitimate public concern.

Now plaintiff also claims that under the Pennsylvania State Police Field Regulations 3-3 that's in evidence here in this case as Exhibit 1—you can take it out with you—which is effective February 14, 1975—you will recall the transfer was on February 19th, the order was issued on February 19th—he had a right not to be transferred as punishment.

Now the right of a state policeman under such regulations not to be transferred as a form of punishment and his right to continue in his employment unless lawfully transferred is a property right, and it is within that category of rights protected by the Fourteenth Amendment to the U. S. Constitution, which says that no state shall deprive any person of property without due process of law.

Thus plaintiff claims that the defendants' transfer deprived him of his right, in violation of proper procedures under the State Police regulation, and that no hearing was held and no detailed charges were brought against him for his conduct in this case.

Now you will see that plaintiff has a double-barreled basis which he claims exists for his actions: First that he was transferred as punishment for exercising his rights of freedom of speech, and secondly that his transfer was in violation of the regulations and deprived him of his property and his job without due process of law.

If you find that the plaintiff's contentions are correct or if either of them are correct, then you, of course, may find that he is entitled to recover. (Transcript, pp. 552-553)

From this the jury could readily conclude that the judge believed and therefore ruled:

1. That if there was a quota system, it was bad.

2. That plaintiff had a constitutional right to leak the quota dispute to the press. [Note that the court did not even mention the troopers as such, using only the words "news media and others".]

3. That plaintiff had a constitutional right under Pennsylvania State Police regulations not to be punitively transferred without a hearing.

4. That the rights listed as numbers 2 and 3 above were double-barreled" and that if either of his contentions was correct plaintiff could recover.

Because defendant admitted that Ruhlman had been given no hearing prior to transfer, under these instructions how else could a jury find?

II. The Trial Court Erred in Its Interpretation of Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968)

The First Amendment issue in this case can be epitomized by the following hypothetical question. A crisis of enormous proportions occurs when a nuclear energy facility is found to be leaking a dangerous substance. A police captain tells his men that the latest word from the Governor is that the facility poses no immediate danger to persons in the vicinity, and that the police are to keep cool, refrain from discussing the specifics of the danger and urge people in the vicinity not to panic or attempt to leave in haste. The sergeant in charge of a detail tells his men that he has heard by radio that in fact the situation is extremely hazardous, and that immediate danger threatens not only people in the vicinity but the policemen themselves. As a result the police panic, the panic spreads to others, and a mass exodus takes place in which a number of people are killed or injured.

What result when the captain censures or punishes the sergeant? Is he liable in damages to the sergeant?

The trial judge in this case would answer the question in the affirmative and in effect so charged the jury. Research has disclosed no other case involving *transfer*

as distinguished from *dismissal,* with the possible exception of *Rosado v. Santiago,* 562 F.2d 114 (C.A. 1, 1977). (It is not clear whether this case was or was not a transfer case, since it was remanded to the district court on the issue of "constructive discharge".) It can be—and is here—strenuously contended that First or Fourteenth Amendment privileges should not be extended to transfers. But for the sake of argument let us suppose that plaintiff Ruhlman had been dismissed. Do *Pickering* and its progeny support the trial judge's charge? *Pickering* sought to balance the interests of the public in its right to know —"legitimate public concern"—and its interest in effective government. That case, and the discharge cases which follow and analyze it,[1] do not really touch directly on the issue presented here. These cases are concerned with the "disruptive impact" of a subordinate's criticism of his superior or with a dispute between the two carried on in the media, or the like. They are persuasive but not dispositive of the issue in this case, where no confrontation between the parties took place and the superior testified that he was unaware of the subordinate's actions.

In this case, a banal situation presents itself which nevertheless gives rise to a number of facts to be found if the trial court's theory is correct:

1. Hankinson imposed the quota system—or he did not.

2. Hankinson knew of the quota system dispute—or he did not.

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[1] *Roseman v. Indiana University,* 520 F.2d 1364 (C.A. 3, 1975); *Sprague v. Fitzpatrick,* 546 F.2d 560 (C.A. 3, 1976); *Porter v. Califano,* 592 F.2d 770 (C.A. 5, 1979).

3. Hankinson knew of Ruhlman's counseling disobedience—or he did not.

4. Hankinson ordered Lorent to pressure the troopers to work harder but (a) condoned (b) did not condone the quota system.

5. Hankinson did not know of Ruhlman's counseling disobedience but transferred him for other —legitimate—reasons.

6. Hankinson did not know but suspected that Ruhlman was counseling disobedience and (a) did not (b) did take this into consideration as one factor in favor of Ruhlman's transfer.

One could probably go on and on. But by this time certain consequences of the trial court's theory begin to suggest themselves:

1. To attempt to reach the truth in such an inquiry inevitably leads the jury into consideration of all the minutiae and trivia of the situation at a given police station. How far into such inconsequentialities must the inquiry be drawn?

2. And if it is so drawn, a police captain may well find himself the victim of a damage suit based on speculations as to his conduct in a situation about which he is only imperfectly informed, if at all. (Hankinson, for example, may well have been ignorant of Ruhlman's participation in the quota controversy.)

3. Therefore police captains will probably seek to avoid lawsuits of this kind by (a) avoiding altogether that occasion of sin which requires them to

impose discipline, or (b) by effectively concealing, by lies and subterfuge, their real motives in imposing sanctions or issuing other orders.

We are thus confronted with the choice between an impotent executive on the one hand and a mendacious one on the other. Neither consequence being palatable, we must look further for a solution. There is set forth below a suggested rule amending *Pickering* as it affects police work:

Speech is action. The underlying message of all civil and criminal law is that action is subject to limits. Before a policeman can lawfully counsel fellow employees or subordinates to disobey orders, he must refer back to his superior the propriety of the orders in question. And to take the next step, before he can fix his superiors with liability for interfering with his free-speech rights, he must give those superiors the opportunity to redress the situation. Otherwise, in countless situations the superior will find himself exposed—like Hankinson—to the hazards of a jury's guessing that he violated free speech rights which he did not know and perhaps could not know were being exercised.

To rule otherwise is to invite the jury to second-guess millions of managerial decisions which really have little to do with free speech. This case, for example, is essentially a labor dispute over working conditions: Hankinson pressed for a speed-up and the men resisted. To entangle such every day occurrences with the First Amendment and §1983 is to visit further disaster upon state governments already reeling from thousands of judicial attacks under the aegis of §1983. See in this regard this Court's ruling that:

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review of every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions. Bishop v. Wood, 426 U.S. 341, 351, 96 S.Ct. 2074, 2080 (1976).

Reservation of Appeal Rights on the Fourteenth Amendment Issue

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The trial court charged the jury that plaintiff Ruhlman had a "double-barreled" basis for his claim—one, that his transfer to Erie violated his right of free speech, and the other that it violated his Fourteenth Amendment right to a due process hearing on a property right under state law not to be punitively transferred.

The jury found for plaintiff on both counts, but the trial court in its opinion ignored the Fourteenth Amendment issue, stating merely that the jury's verdict for plain-

tiff on the First Amendment issue rendered it unnecessary to discuss the alternative basis.

Petitioner does not intend to abandon his defense that the Fourteenth Amendment grants plaintiff no such property right. He does not press the argument here for two reasons: (1) it would unduly lengthen this petition; and (2) the Court is unlikely to consider it when neither the district court nor the court of appeals did so.

CONCLUSION

At present the law in the Third Circuit reads, "A state policeman may encourage his fellows and his subordinates not to follow orders which he believes to be morally wrong or unlawful, and if transferred to another station for so doing may sue his superior under 42 U.S.C. §1983 and recover substantial monetary damages for infringement of his First Amendment rights. A policeman's right to insubordination is thus enshrined in the Constitution."

Is this the law of the United States?

For the reasons set forth above, petitioner requests the Court to grant a writ of certiorari. If the writ is granted, the petitioner prays the Court (1) to reverse the judgment of the courts below and enter judgment for petitioner; or (2) to remand the case to the Court of Appeals with directions to grant a new trial with appropriate instructions to the District Court for the correction of its errors in the earlier trial; or (3) to remand the case to the

Court of Appeals with instructions to hear argument en banc and to write an opinion elucidating the court's order.

PATRICK J. HANKINSON
Petitioner
JOHN M. DUFF
Deputy Attorney General
FREDERICK R. NENE
Deputy Attorney General
EDWARD G. BIESTER, JR.
Attorney General

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 76-73 (Erie)

David K. Ruhlman

v.

James D. Barger, Patrick J. Hankinson and Robert B. Gorman

Dated: December 30, 1976

MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This is a civil rights action brought pursuant to 42 U.S.C. 1983 and 1985 seeking a declaratory judgment, damages, and injunctive relief. The plaintiff is David K. Ruhlman, a Sergeant in the Pennsylvania State Police, presently assigned to the Erie Barracks. The defendants are Colonel James Barger, Commissioner of the Pennsylvania State Police, Captain Patrick J. Hankinson of the State Police in Erie, and Lieutenant Robert B. Gorman of the State Police in Franklin, Pa. The court has jurisdiction of this action under 28 U.S.C. 1343 and 42 U.S.C. 1981.

The matter is now before the court on defendants' motion to dismiss plaintiff's amended complaint. The parties have submitted briefs on the question and the court heard the parties' oral arguments on September 23, 1976.

On February 19, 1975 plaintiff was transferred from the Franklin, Pa. substation of the State Police to the Erie Barracks, allegedly for punitive reasons. Plaintiff charges in his amended complaint that defendants conspired to impose this transfer on him as a form of punishment because he had (1) opposed the use of a quota system for arrests and traffic citations at the Franklin substation (2) joined with other troopers at Franklin in revealing the quota system to a local newspaper reporter and (3) refused to refrain from gambling with other police personnel at certain social gatherings. The order transferring plaintiff to Erie, issued February 19, 1975, became effective on March 6, 1975.

Plaintiff claims that the defendants' actions in planning and issuing the transfer order violated his rights of free speech and assembly under the First Amendment, and denied him due process of law under the Fourteenth Amendment. The amended complaint also alleges that under State Police Regulations a trooper is entitled to administrative due process whenever punishment is imposed, and that defendants here used the transfer as a "subterfuge" for punishment, in order to circumvent plaintiff's due process rights under the Regulations.

I

Initially, the court notes that defendants' actions in issuing any transfer order, in the course of their duties, would constitute conduct "under color of state law" with-

in the meaning of 42 U.S.C. 1983. Thus, the necessary state action is present in this case alleging deprivation of plaintiff's constitutional rights.

In ruling on defendants' motion to dismiss, the court adopts the well-accepted rule that "a complaint should not be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). Therefore, we must consider all facts alleged in the complaint and every reasonable inference to be derived therefrom in the light most favorable to plaintiff. For the reasons stated below, the defendants' motion will be denied.

II

A. Deprivation of Liberty

The first issue presented is whether plaintiff's transfer constituted a deprivation of protected free speech in violation of the First Amendment. We must examine this claim in light of the Supreme Court's opinion in Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed. 2d 811 (1968) and subsequent cases.

Pickering involved a high school teacher who sent a letter to the local newspaper criticizing the way in which the superintendent and Board of Education had handled certain bond proposals. The Board dismissed Pickering, and at a hearing found that some of the statements in the letter were false and that the letter was detrimental to the best interests of the school district. The Supreme Court ultimately held that the dismissal violated Pickering's First Amendment rights. The Court noted

that the problem in any case involving the free speech rights of State employees is to "arrive at a balance between the interests of the (employee), as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. 391 U.S. 563, 568, 20 L.Ed. 2d 811, 817. Pickering emphasized two factors to be considered in determining whether an employee's statements are protected free speech:

(1) whether the statements are concerned with a matter of legitimate public interest

(2) whether the statements will undermine important employment relationships.

> The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Pickering v. Board of Education, 391 U.S. 563, 569-70, 20 L.Ed. 2d 811, 818 (1968).

See also Madison Joint School Dist. v. Wis. Emp. Relations Comm., (U.S. Sup. Ct. 75-946, slip opinion, Dec. 8, 1976).

In Roseman v. Indiana University, 382 F. Supp. 1328 (W.D. Pa. 1974), aff'd, 520 F.2d 1364 (3d Cir. 1975), cert. denied, 424 U.S. 921 (1976), Roseman, an associate professor of foreign languages at the University, made serious accusations against the acting chairman of her department's teaching staff. One week later, the University decided not to renew her teaching contract. This court held that Roseman's statements were not protected speech under the First Amendment. Unlike the letter in Pickering, her attacks upon the acting department chairman were not concerned with any issue of public importance. Also, we noted that:

> In the instant case, plaintiff's attacks upon Faust's integrity in a faculty meeting will undoubtedly have the effect of interfering with harmonious relationships with plaintiff's superiors and co-workers, and we therefore hold that if plaintiff's remarks in any way contributed to her discharge, they did not constitute protected free speech. Roseman v. Hassler, 382 F. Supp. 1328, 1339 (W.D. Pa. 1974).

In the recent case of Sprague v. Fitzpatrick, (3d Cir. 76-1266, slip opinion, Dec. 6, 1976) the Third Circuit again applied the guidelines set forth in Pickering and Roseman. Here, Richard Sprague, an Assistant District Attorney in Philadelphia, was discharged for remarks he made in a newspaper interview to the effect that earlier statements by his superior, the District Attorney, were untrue. The Third Circuit upheld the dismissal of Sprague's claim that the discharge was a deprivation of free speech. While Sprague's interview did deal with matters of "grave public import", his statements that his superior had not told the truth completely undermined any effective working relationship. Slip Opinion, at 9.

In the case at hand, plaintiff Ruhlman alleges that a quota system was begun at the Franklin Barracks in June or July of 1974 by the Traffic Sergeant, Henry T. Lorent. Other troopers at the Barracks approached the plaintiff and solicited his help in opposing enforcement of the quota system. Plaintiff claims that he brought the matter to the attention of the Station Commander, defendant Robert Gorman, and that Gorman assured him that he would direct Sergeant Lorent to discontinue the practice. The quota system allegedly continued until February 1975, when plaintiff and other troopers revealed the matter to the local newspaper. Subsequently, on February 19, 1975, the order transferring plaintiff to Erie was issued.

Applying the principles outlined in Pickering and Roseman to these facts, the court finds that plaintiff has stated a valid claim for deprivation of protected free speech. First, the existence of a quota system for traffic arrests at a State Police Barracks is a matter of legitimate public interest. Second, taking the facts alleged in the light most favorable to plaintiff, Conley v. Gibson, supra, there is no indication that the plaintiff's remarks to the newspaper regarding the quota system were directly aimed against co-workers or an immediate superior. Thus, although plaintiff may have been dealing with a controversial matter, his statements would not have the kind of disruptive impact on close working relationships that occured in Roseman and Sprague.

The court notes that although plaintiff has been transferred from his home in Franklin to Erie, he has not been either demoted or discharged. However, because plaintiff has allegedly been subject to disciplinary action

for his exercise of protected speech, he has stated a justiciable claim under 42 U.S.C. 1983. See Gissi v. Codd, 391 F. Supp. 1333, 1336 (E.D. N.Y. 1974).

B. Deprivation of Property

Plaintiff claims that the transfer to Erie, issued without a hearing, denied him due process of law under the Fourteenth Amendment. In Board of Regents v. Roth, 408 U.S. 571, 92 S.Ct. 2701 (1972), the Court noted that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." 408 U.S. 564, 569, 33 L.Ed. 2d 548, 556. Thus, in evaluating this aspect of plaintiff's claim, we must determine whether the transfer to Erie deprived him of a property interest within the protection of the Fourteenth Amendment.

Roth is the leading Supreme Court decision setting forth the elements of a property interest protected by procedural due process. There, the court stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. Board of Regents v. Roth, 408 U.S. 564, 577, 33 L.Ed. 2d 548, 561 (1972).

Further, Roth noted that there must be a state law basis for a legitimate claim of entitlement to a property right.

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 408 U.S. at 577, 33 L.Ed. 2d at 561.

Under the guidelines established in Roth, we find that the Pennsylvania State Police Field Regulations create a property right in the plaintiff not to be transferred as punishment. Paragraph D, Pennsylvania State Police Regulation FR 3-3, entitled "Discipline", specifically provides that "[t]he use of transfer as a means of punishment is prohibited" and that a "transfer *will not* be used as a subterfuge to impose punishment."

> D. Restrictions: The punishment mandated in each disciplinary level shall be the *exclusive* means by which a member may be disciplined for an offense. The use of transfer as a means of punishment is prohibited.
>
> However, a member may be transferred by the Deputy Commissioner, on an INTRA-Regional basis for the good of the Department or the Member, if the Member's action has:
>
> 1. Substantially jeopardized or damaged the reputation and/or image of the Department, or the Member;
>
> 2. Caused or created a situation which substantially impairs the overall working relationship of the function to which the Member is assigned.

> In such cases, the damage to the Department's reputation and/or image, or the impairment of the working relationship *must* be capable of being substantiated, and said transfer WILL NOT be used as a subterfuge to impose punishment.

This regulation provides the basis in state law within the meaning of Roth for plaintiff's claim that a property right is implicated in his transfer.

Thus, taking as true the facts alleged in plaintiff's complaint, the transfer in this case would violate specific provisions of the State Police Field Regulations and constitute a deprivation of property within the meaning of the Fourteenth Amendment. Since at the time in question there was no applicable grievance procedure available to plaintiff nor any other means of redress, the court's opinion is that plaintiff has stated a viable claim for denial of due process of law under the Fourteenth Amendment.

This court is aware of the two recent Supreme Court decisions Bishop v. Wood, U.S. , 48 L.Ed. 2d 684 (1976) and Rizzo v. Goode, U.S. , 46 L.Ed. 2d 561 (1976) which caution the federal courts against becoming involved in the day to day affairs of police departments. However, those decisions are not controlling here. In Bishop, the Court found that the plaintiff policeman did not have a basis in state law for his claim to a property interest in continued employment. Thus, he was not constitutionally entitled to a hearing upon termination. In this case, we find that the State Police Regulations in fact create a property right in the plaintiff not to be transferred as punishment. Defendants allegedly conspired to deprive him of this right without giving him

a hearing and therefore the complaint states a cause of action under the Fourteenth Amendment.

The Rizzo case is also inapplicable to the facts of this case. Rizzo involved a class action seeking to set up a new procedure to handle complaints of police misconduct in Philadelphia. The Rizzo Court noted that the plaintiffs had established no link between the alleged instances of police misconduct and any official policies of the named defendants or the police department. The Supreme Court in Rizzo sustained dismissal of the plaintiffs' complaint on the basis that intervention by the federal courts would interfere with the proper daily functioning of the Philadelphia Police Department. In this case, the plaintiff challenges decisions by the named defendants who carried out an alleged conspiracy to transfer him to Erie for punitive reasons. As previously stated, the plaintiff's complaint directly implicates liberty and property rights. Further, the plaintiff has not filed a class action and is not seeking a major overhaul of police procedures as was the case in Rizzo. The concern expressed by the Supreme Court in Rizzo about the intrusion of the federal courts into the daily operations of city police departments does not appear to be a major factor in this case.

Therefore, in conclusion, the court deems it appropriate that the plaintiff be permitted to present evidence in support of his claims in a trial on the merits of this case. The defendants' motion to dismiss will be denied for all of the above reasons. An appropriate order will be entered.

(s) William W. Knox
D. J.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 76-73 (Erie)

David K. Ruhlman

v.

James D. Barger, Patrick J. Hankinson and Robert B. Gorman

ORDER

AND NOW, to wit, December 30, 1976, after careful consideration of the briefs and arguments of counsel and for the reasons advanced in the foregoing memorandum,

IT IS ORDERED that the defendants' motion be and hereby is denied.

IT IS FURTHER ORDERED that Rule 511 of this court shall issue at once.

(s) William W. Knox
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-73 Erie

David K. Ruhlman

v.

James D. Barger, et al.

Dated: January 31,1978.

MEMORANDUM DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This court has previously in memorandum and order denying defendants' motion to dismiss filed December 30, 1976, held that plaintiff's amended complaint was sufficient to withstand defendant's motion to dismiss. It was held that the amended complaint on the face of it alleged a disciplinary transfer for exercise by plaintiff of protected free speech in violation of the First Amendment. In this connection it is noted that plaintiff claimed that he was transferred because of having revealed an alleged quota system in the operation at the Franklin, Pennsylvania State Police Barracks with respect to traffic arrests. It was further held that plaintiff had pleaded a cause of

action for transfer to Erie without a hearing denying plaintiff due process of law under the Fourteenth Amendment. It was pointed out that plaintiff asserted a property right under State Police Field Regulations as stated in FR 3-3 approved February 4, 1975 to be protected against a transfer as punishment or a disciplinary measure. Plaintiff claimed that FR 3-3 stated "transfer *will not* be used as a subterfuge to impose punishment."

The defendants have now filed a motion for summary judgment with affidavits and other materials accompanying the same asserting that after completion of the discovery proceedings it appears that plaintiff has not made out a case and therefore the defendants are entitled to judgment in their favor. Plaintiff has countered with various other affidavits and materials, certain depositions have been held and various portions thereof are quoted.

The court is mindful of the rule that summary judgment should not be granted if there are any possible disputes of fact or inferences involved in the case which must be passed upon by the trier of the facts. Doubtful cases should go to trial. It is not for the trial judge on consideration of a motion for summary judgment to make determination of what inferences are to be derived from the evidence. See Tomalewski v. State Farm Life Insurance Co., 494 F.2d 882 (3d Cir. 1974).

The court has painstakingly reviewed all the materials submitted to it and has concluded that there is sufficient doubt about the matter and doubt as to inferences to be drawn from the facts brought to the court's attention to demand that the case be heard upon the merits.

With respect to freedom of speech, it is the defendant's position that the evidence shows that *defendant* was not transferred as the result of any exercise of freedom of speech. It appears from affidavit of Farrance, reporter for the Oil City Derrick, that he first began to investigate the matter of the quota system and other subjects of complaints at the Franklin Barracks in February 1975 and at that time plaintiff and other troopers brought the existence of this quota system to the paper's attention. On March 6, 1975, an article appeared in the newspaper relative to this matter. At that time Sergeant Lorent, newly assigned to the Franklin Barracks was quoted as pressuring troopers to increase the number of arrests for traffic violations and was quoted as fostering a slogan "Think 20" (arrests per month). We have previously ruled that the matter of forcing quotas upon state troopers resulting in unnecessary and baseless arrests in order to meet these quotas is certainly a matter of public concern.

The Commonwealth points out that Ruhlman's transfer to Erie had been initiated according to the affidavits and documents submitted by Captain Hankinson on January 8, 1975. This was approved by his superior on January 20, 1975 and on February 3, 1975, was approved by the deputy commissioner. It appears that the reporter first began checking this matter February 1, 1975 or shortly thereafter. The difficulty is that the order of transfer is dated February 19, 1975, effective March 19, 1975, Ex D attached to motion, and this was well after the reporter began to investigate the matter of unrest over the imposition of the quota system. It appears that Ruhlman had been having some difficulties with his superiors before mainly as the result of an alleged gambling episode

during a policeman's party and it cannot be determined without a trial on the merits whether the captain was aware of the fact that the reporters were working up a story about the quota system and other matters at the Franklin Barracks at this time and that this actually was punishment for discussing matters with the press.

Further with respect to deprivation of property rights as noted the regulations forbidding disciplinary transfers became effective February 4, 1975, just exactly one day after the approval by the deputy commissioner. These regulations were printed up and put into effect on that day and it would appear obvious that they must have been in process of preparation during January 1975 when the procedure to transfer Ruhlman was in the machinery. To what extent this was known to Captain Hankinson is uncertain but from the coincidence of the dates an inference is possible that the transfer of Ruhlman was speeded up so as to precede by one day the effective date of the new disciplinary regulations forbidding transfers for the purpose of discipline. As noted the transfer order was not issued until Feb. 19, after the regulations were in effect. The regulations on February 4, provided that the use of transfer as a means of punishment is prohibited and it WILL NOT be used as a subterfuge to impose punishment. The result is that on February 4, the regulations created what appears to be a property right in Ruhlman not to be subject to disciplinary transfers and it would thus appear that this regulation was violated when the transfer order was issued on February 19.

In view of the liberal attitude recently expressed by the Court of Appeals for the Third Circuit with respect to

Civil Rights Actions in Bethel v. Jendoco Constr Corp., No. 77-1165 (1/16/78) the court determines that this particular case should not be decided where there are conflicting inferences upon the basis of summary judgment materials but rather that the entire matter should be aired in a trial on the merits.

The court is aware of the decision of Judge Herman in the Middle District in the case of Shepp v. Berger, 75-1288 filed December 2, 1976. However in that case it does not appear that property rights were involved as in the case now as a punitive measure. According to the regulations there involved such transfers were allowed "where deemed for the good of the department or the officer" and in case of certain findings which is not the case of the regulations now before us. It further appears that the matter being discussed in Shepp was not a matter of public concern and free speech such as may be involved in the instant case.

An appropriate order will be entered.

(s) William W. Knox
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-73 Erie

David K. Ruhlman

v.

James D. Barger, et al

ORDER

AND NOW, to wit, January 31, 1978, for reasons set forth in the accompanying memorandum,

IT IS ORDERED that defendants' motion for summary judgment be and the same hereby is denied.

(s) William W. Knox
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-73 Erie

David K. Ruhlman,

v.

Patrick J. Hankinson and Robert B. Gorman

MEMORANDUM DENYING MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE TO AMEND THE JUDGMENT

Plaintiff, a former Pennsylvania State Police sergeant, filed this civil rights suit against defendants,[1] his superior officers, alleging that they violated his civil rights by transferring him from his assignment in Franklin, Pa. to a post in Erie, Pa. Plaintiff contended (1) that the transfer was in retaliation for his exercise of his First Amendment right to freedom of speech, specifically his counselling of the troopers at the Franklin station to oppose the imposition of a quota system relating to numbers of arrests and traffic citations and his revelation of this

[1] A directed verdict was granted at the close of plaintiff's case in favor of a third defendant, James D. Barger, Commissioner of the Pennsylvania State Police.

quota system to a local newspaper reporter[2] and (2) that the transfer denied him due process of law under the Fourteenth Amendment and administrative due process under State Police regulations. This case was tried before a jury in June, 1978, and resulted in a finding in favor of defendant Gorman and against the plaintiff and in favor of plaintiff and against defendant Hankinson. The jury completed a special verdict (a copy of which is attached) and awarded plaintiff $50,000. Judgment was entered on this verdict on June 19, 1978, following which defendant Hankinson filed the motions under consideration here pursuant to FRCP 59(a) and (e). Both motions must be denied.

MOTION FOR NEW TRIAL

Initially, the court notes that at trial plaintiff discarded his contention that his transfer constituted punishment for having revealed the existence of the quota system to the press,[3] and proceeded on the alternative First Amendment theory that he was transferred for his discussions with certain troopers concerning his, and their, opposition to the quota system. Although this alternative claim was not set forth specifically in plaintiff's pre-trial narrative, and although parties are confined to the issues enumerated in such narratives, plaintiff's pre-trial statement does incorporate by reference plaintiff's memoran-

[2] This latter theory was abandoned by plaintiff at trial, as discussed hereinafter.

[3] His revelation to the press occurred after his transfer.

dum in opposition to defendants' motion for summary judgment. This memorandum states: "What the plaintiff maintains . . . is that he was punished because he openly exhorted the Troopers to oppose the quota system and because he did 'buck the system,' the command made an example of him." (p. 8) Consequently, plaintiff's abandonment of one free speech theory and advancement of another at time of trial could not have resulted in any surprise or prejudice to defendants since they were put on notice that plaintiff was proceeding on both theories.

It is well established that in considering a motion for new trial following a jury verdict, a court should refrain from interfering with the verdict unless it is clear that the jury reached a seriously erroneous result. Draper v. Erie R.R. Co., 183 FS 899 (W.D. Pa. 1960), aff'd 285 F. 2d 255 (3d cir. 1960). Further, plaintiff herein is entitled to have the evidence viewed in the light most favorable to him and to have "the benefit of all inferences which the evidence fairly supports". Continental Ore v. Union Carbide, 370 U.S. 690, 8 L.Ed. 2d 777, 82 S. Ct. 1404 (1962). Finally, "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable". Tennant v. Peoria & Pekin, 321 U.S. 29, 88 L.Ed. 520, 64 S. Ct. 409 (1944). Applying this standard of review to the instant case, we proceed to a consideration of the merits.

It is now firmly established that public employees enjoy the protection of the First Amendment's guarantees. Keyishian v. Board of Regents, 385 U.S. 589, 17 L.Ed.

2d 629, 87 S. Ct. 675 (1967). It is also recognized, however, that the government has a legitimate interest in regulating the nature and extent of its employees' public statements. Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed. 2d 811, 88 S. Ct. 1731 (1968). Depending upon the nature of the employment relationship in question, the government is entitled to maintain some degree of flexibility with respect to the parameters of this regulation. Certainly, the unique circumstances involved in police department employment, as in the instant case, may necessitate a greater restriction on a police officer's freedom of speech in order to maintain discipline than would be required of other government employees. As stated by the Court of Appeals for the Seventh Circuit: "To the extent that being a policeman is public employment with unique characteristics, the right of the employee to speak on matters concerning his employment with the full freedom of any citizen may be more or less limited. It is not, however, destroyed". Muller v. Conlisk, 429 F.2d 901, 904 (1970).

In the instant case, defendant Hankinson contends that although as a policeman plaintiff may have been entitled to some degree of protection under the First Amendment for statements made in public, the exhortations he made to the troopers at the Franklin station to oppose the quota system were unprotected private communications. Defendant's reliance on the denial of free speech protection given to the private utterances in Roseman v. Indiana Univ. of Pa., at Indiana, 520 F.2d 1364 (3d Cir. 1975) for this proposition, however, is misplaced. Although the court in Roseman did distinguish its factual situation from that in Pickering on the basis of the private nature

of the former as opposed to the public nature of the latter, the court coupled the forum issue with a distinction based on the degree of public interest involved in the statements made by Roseman. The court held that Roseman's communications "concerned an issue of less public interest than Pickering's." 520 F.2d at 1368. Significantly, the court stated that "if Roseman's [private] communications to McGovern and at the faculty meeting had been on issues of public interest, *or* if she had convinced local news media that her grievance against Faust was newsworthy, entirely different considerations would come into play." 520 F.2d at 1368, fn. 11 (emphasis added). Thus, the court recognized that although a communication may be essentially private in its scope, it is nevertheless entitled to First Amendment protection if it concerns a matter of legitimate public interest.

The jury in this case was instructed concerning the requirement that plaintiff's statements to the troopers encompass "a matter of legitimate public concern" in order to entitle plaintiff to protection, and the jury found specifically that they did. (See Special Verdict, question No. 2). Consequently, although plaintiff's communications to the troopers were essentially private, since they related to a matter of legitimate public concern, they were entitled to be analyzed as protected free speech.

Having determined that plaintiff's statements were not precluded from First Amendment protection because of the private nature of the forum in which they were uttered, it is necessary to determine whether under the standard for analysis established in Pickering the statements remained within the ambit of the First Amendment or fell outside of its umbrella. In Pickering, the Court

stated: "The problem in any case is to arrive at a balance between the interests [of the employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568, 20 L.Ed. 2d at 817. The Court then enumerated several factors which were to be scrutinized and weighed in arriving at this balance. These elements included (1) the impact of the statements on co-worker harmony, (2) the proximity of contact between the speaker and the subject of the criticism, (3) the sensitivity of the employer-employee relationship, and (4) the degree of interference with the regular operation of the enterprise or with the performance of the speaker's duties.

In the instant case, there was no evidence that plaintiff's discussions with the troopers had an adverse effect on co-worker harmony. The testimony established that throughout the summer and fall of 1974, Patrol Sgt. Henry T. Lorent stated to various troopers that they should "think 15" or "think 20" arrests or citations per month, and urged them to "pork 'em" as they left the Franklin station to begin their patrols. He cautioned them that if they failed to meet their monthly quotas, they could be transferred, given undesirable duty assignments, or punished in some other, perhaps more subtle, fashion. Several troopers testified that they were so concerned about this quota system that they approached plaintiff, who was known to be accessible, and used him as a sounding board for their complaints.[4] Plaintiff advised them that

[4] A quota system may be defined as a requirement that each trooper make a certain number of arrests per month or per week,

the system was improper, that they should stress quality rather than quantity in their work, and that Lorent's directives were wrong. This evidence established that a definite morale problem existed at the Franklin Station in late 1974 and early 1975 and that many troopers disagreed with, and perhaps disliked, Sgt. Lorent. Without question, however, this low morale, with its potential adverse effect on co-worker harmony, was engendered by the imposition of the quota system by Sgt. Lorent, not by any attempt on plaintiff's part to disrupt the system. Sergeant Ruhlman did not initiate the unrest at the Franklin station; on the contrary, he attempted to alleviate it. All witnesses agreed that he was always respectful and obedient to his superiors.

The second factor discussed in Pickering is the closeness of contact between the speaker and the subject matter of the criticism. In the instant case, it is true that plaintiff was in as good a position as anyone at the station to observe the effects of the quota system upon the troopers and to comment upon it. The troopers selected him as their sounding board and he counseled them in accordance with his conscience. It is also significant to note, however, that after several troopers complained to him about the system, he informed Gorman of their unrest. Although there was no evidence that plaintiff ever talked directly to Hankinson about the matter or that Gorman conveyed his conversation with Ruhlman to Hankinson, the jury could reasonably have inferred that Hankin-

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whether justified or not. This naturally causes an outcry among the public and disrespect for law enforcement; particularly at the end of the quota period.

son was aware both of the low morale at Franklin and of its cause. Consequently, Hankinson would have had every opportunity to rebut plaintiff's statements or to take action to quell the unrest by instructing Lorent to refrain from employing a quota system. Thus, although it may have been preferable for plaintiff to have discussed the matter directly with Hankinson, the jury could have inferred that both the employer and the employees had access to the facts and that Hankinson could have rebutted any statements made by plaintiff without having to suppress him.

In Pickering, the Court noted that "significantly different considerations would be involved" in cases where "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine" the effective relationship between them. 391 U.S. at 570, fn. 3. In Sprague v. Fitzpatrick, 546 F.2d 560 (3rd Cir. 1976), the Third Circuit held that such a relationship existed between the Philadelphia District Attorney and his First Assistant. The court held that no First Amendment rights were violated when the First Assistant was discharged for having impugned the integrity of the District Attorney in public. In this case, the court notes that no evidence was presented which in any way indicated that plaintiff had been disparaging or defamatory toward his superiors. He did not engage in name-calling or the use of lewd, insulting, or "fighting words." On the contrary, the testimony clearly established that plaintiff was always respectful toward his superiors. Further, it is significant that, unlike the statements made by the plaintiff in Sprague, supra,

the discussions by the plaintiff in this case were not even directed toward his immediate superiors. Instead, they concerned the quota system, a matter of grave concern to the troopers and to the general public, and, tangentially, Sgt. Lorent. Finally, the jury was instructed that if they found that plaintiff maligned or defamed defendants, his speech would not be protected. Consequently, since plaintiff's statements to the troopers were not aimed at defendant Hankinson, but at a matter of public interest, the sensitivity of the relationship between plaintiff and Hankinson was not undermined.

The most troublesome element of Pickering, as applied to this case, is that of interference with the regular operation of the station. There is no doubt that plaintiff did exhort the troopers to disobey any attempt on the part of Lorent to impose a quota system. The impact of this exhortation on the operation of the station is the disputed issue.

It has been held that otherwise protected speech must "materially and substantially" disrupt the operation of the enterprise before it can be said to have relinquished this protection. Tinker v. Des Moines School Dist., 393 U.S. 503, 21 L.Ed. 2d 731, 89 S.Ct. 733 (1969); Hastings v. Bonner, 578 F.2d 136 (5th Cir. 1978); Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976). In this case, as discussed above, although disruption of the operation of the station may have occurred in that morale was low and some troopers did not fulfill their quotas, any such disruption was precipitated by the imposition of the quota system rather than by plaintiff's discussions with the troopers. It is important to remember that plaintiff did

not initiate any conversations with the troopers regarding the quota system; the troopers came to him requesting his advice. The unrest existed because the troopers were disgruntled as a result of Lorent's thinly-veiled threats to them; plaintiff merely attempted to alleviate the strain and unhappiness by counselling the troopers that it was not wrong to disobey an improper order.

Defendant Hankinson contends, however, that plaintiff's statements constituted a call to mutiny, thereby creating a *potential* for disruption which Hankinson was obligated to suppress. It has been held that "In a situation of potential disruption there is no requirement in the law that the proper authorities must wait for the blow to fall before taking remedial measures." Birdwell v. Hazelwood School Dist., 491 F.2d 490 (8th Cir. 1974). It has also been held, however, that the speech must pose a "substantial threat to material disruption," in order to remove it from the protection of the First Amendment. Franklin v. Atkins, 409 F.2d 439 (D. Colo. 1976); see, Healy v. James, 408 U.S. 169, 33 L.Ed. 2d 266, 92 S.Ct. 2338 (1972). Given that the evidence in this case established that discontent among the troopers had existed from mid-1974, some 6 months prior to plaintiff's transfer, it cannot be said that such a "substantial threat" to further disruption existed.

In Whitsel v. Southeast Local School Dist., 484 F. 2d 1222 (6th Cir. 1973), the court upheld the discharge of a high school teacher who had made statements to an unauthorized assembly of students which encouraged disobedience to the directions given them by the principal and superintendent to return to their classes. The court

held that plaintiff's words "went beyond the mere advocacy of ideas and counselled a course of action," and that plaintiff "was not terminated for the advocacy of ideas but for insubordination." 484 F.2d at 1229. Arguably, Sgt. Ruhlman's statements to the troopers could be viewed as insubordination. Indeed, it may have been preferable for him to have discussed the quota system issue with Hankinson directly. In Whitsel, however, the plaintiff was determined to have "inflamed" the existing situation and to have encouraged the students to disobey a legitimate directive from plaintiff's superiors. In the instant case, by contrast, plaintiff did not "inflame" the situation, but rather attempted to quell the unrest. Further, plaintiff counselled the troopers that they did not have to obey an order from another sergeant at the station which they, and he, believed to be unlawful.

Although plaintiff's case was thin, and the evidence did not compel the verdict reached, the jury was justified in finding that plaintiff was transferred for the exercise of protected rights rather than for insubordination. In a close case such as this, a court has no authority to overturn the jury's verdict unless its decision was clearly erroneous. The court is unable to hold that it was.

While the defendant advanced legitimate reasons for plaintiff's transfer (in the nature of an existing need for his services in Erie) unrelated to the quota system controversy, the jury was properly instructed that plaintiff's First Amendment speech need have been only "a substantial factor" in the transfer decision. Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 50 L.Ed. 2d 471, 97 S.Ct. 568 (1977). Consequently, viewing the evidence in the light most favorable to the plaintiff, as we must then considering a motion for new trial, the court concludes that the jury was justified in finding as it did and defendant Hankinson's motion for new trial must be denied. Having determined the First Amendment issue in favor of the plaintiff, the court finds it unnecessary to address the Fourteenth Amendment due process property right question.

MOTION TO AMEND THE JUDGMENT

Defendant Hankinson contends that the $50,000 damage award is excessive and unwarranted and moves the court pursuant to FRCP 59(e) to amend the judgment by reducing the award. The standard of review of a jury's damage award is similar to that employed in the determination of a motion for new trial. Although an award may be high, it should stand if there is ample evidence to support it or unless it shocks the conscience of the court. Gruenthal v. Long Island R.R. Co., 393 U.S. 156, 21 L.Ed. 2d 309, 89 S.Ct. 331 (1968); Lebeck v. Wm. A. Jarvis, Inc., 250 F.2d 285 (3rd Cir. 1957). The court is not permitted to arbitrarily substitute its judgment for that of the jury. Lloyd v. Monessen Southwestern Ry. Co., 174 F. Supp. 751 (W.D. Pa. 1959).

In the instant case, plaintiff established that he had sustained liquidated damages in the amount of $28,921.-43 as a result of the transfer. In addition, substantial evidence was presented relating to the emotional distress suffered by Sgt. Ruhlman and its accompanying physical

side effects. Finally, testimony was offered to the effect that plaintiff had undergone a material personality change following the transfer.

Compensatory damages for emotional distress are recoverable in a civil rights action. Paton v. LaPrade, 524 F.2d 862 (3rd Cir. 1975); Aumiller v. Univ. of Delaware, 434 F. Supp. 1273 (D. Del. 1977). Sgt. Ruhlman produced evidence of emotional distress amounting to more than "some pressure and embarrassment" which was found not to warrant a $10,000 damage award in Alicea Rosado v. Garcia Santiago, 562 F.2d 114 (1st Cir. 1977). Consequently, the court concludes that there was sufficient evidence to sustain the jury's award of $50,000. Defendant's motion to amend the judgment must be denied.

An appropriate order will be entered.

(s) William W. Knox
U. S. District Judge

Dated: Nov. 7, 1978

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-73 Erie

David K. Ruhlman

vs.

Patrick J. Hankinson and Robert B. Gorman

JUDGMENT ORDER

AND NOW, to wit, June 19, 1978, the jury having returned a special verdict, copy of which is attached hereto,

IT IS ORDERED that judgment be and hereby is entered in favor of the plaintiff, David K. Ruhlman, and against the defendant, Patrick J. Hankinson, in the amount of $50,000.00.

IT IS FURTHER ORDERED that judgment be and hereby is entered in favor of the defendant, Robert B. Gorman, and against the plaintiff, David K. Ruhlman.

William W. Knox
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1007

David K. Ruhlman
v.
James D. Barger,
Patrick J. Hankinson,
Robert B. Gorman
Patrick J. Hankinson, *Appellant*

Appeal from the United States District Court for the
Western District of Pennsylvania
C. A. No. 76-0073
Argued September 6, 1979
Before: Adams, Hunter and Higginbotham, *Circuit Judges*

JUDGMENT ORDER

After considering all the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Each side to bear its own costs.

By the Court,
Arlin M. Adams
Circuit Judge
Attest:
Betty J. Robinson
Deputy Clerk

Dated: September 12, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1007

David K. Ruhlman
v.
James D. Barger, et al.,
Patrick J. Hankinson, appellant

SUR PETITION FOR REHEARING
EN BANC

Present: Seitz, *Chief Judge,* Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth, Higginbotham and Sloviter, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(Sgd.) Arlin M. Adams
Circuit Judge

Dated: October 9, 1979